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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,
Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the Establishment Clause requires the denial of equal access to a small, voluntary, student-initiated and student-led group wishing to meet for religious speech in a limited open forum created by a public high school.

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, the petitioners herein and appellees in the court of appeals below are Petros, an unincorporated association, and the parents acting on behalf of the following students*: Michael Bender, Denise and Michelle Marshall, Julie Hobart, Jeffrey Fredrof, Brian Foelsch, Julie, Heidi, and Kim Ulmer, Shawn Seevers, Peter Strayer, and Bruce Brossman. Mr. John C. Youngman, Jr., then a member of the Williamsport Area School Board, was a defendant in the district court and the appellant below. Williamsport Area School District was a defendant in the district court. Although it did not take a formal role in the court of appeals proceedings, the Williamsport Area School District has treated Mr. Youngman's appeal as its own throughout these proceedings. *See* n.7, *infra*.

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* Students involved have graduated at different stages of the litigation and the court of appeals granted the students' motion to add additonal plaintiffs. App. A at 4a n.4. As a result, the name of Michael Bender has been substituted for that of Lisa Bender, who has graduated from Williamsport Area High School. Denise Marshall, Julie Ulmer, Shawn Seevers, Peter Strayer, and Bruce Brossman graduated during the court of appeals proceedings.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Michael Bender, et al., Williamsport Area High School students, who are members of Petros, an unincorporated association (hereinafter, collectively, "the students" or "Petros"), respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*) is reported at 741 F.2d 538. The opinion of the District Court (App. C, *infra*) is reported at 563 F. Supp. 697.

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1984. The court's order denying rehearing and suggestion of rehearing *en banc* (App. B, *infra*), was entered on August 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Equal Access Act, Title VIII of Public Law 98-377, enacted on August 11, 1984, is reprinted at Appendix E, *infra*.

STATEMENT OF THE CASE

A. The Facts

Williamsport Area High School ("Williamsport High") is a 2500-student secondary school which serves students in grades 9 through 12. J.A. 238.[1] Williamsport High draws students from about a 100 square mile area and is located on a 147-acre campus, more than a mile from the nearest residence. J.A. 239, 248-249. Consequently, the vast majority of the students arrive and leave the school by bus. J.A. 246. Students are to be in their homerooms at 7:45 AM for twelve minutes during which attendance is taken and announcements made. J.A. 365.

On Tuesday and Thursday mornings, the school has an extracurricular activity period which runs from 7:57 AM to 8:27 AM, immediately following homeroom. J.A. 245-46, 368. The purpose of the activity period is to accommodate those student activities that contribute "to the intellectual, physical, or social development of the students and is otherwise considered legal and constitution-

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[1] Citations to the record as reprinted in the joint appendix submitted to the court of appeals will be denoted as "J.A.". Citations to materials in the separate appendix accompanying this petition will be denoted as "App.".

ally proper." App. A at 9a, quoting affidavit of Principal Wayne Newton. It is "a time during the day in which students can take care of all extracurricular activities." J.A. 245 (Dep. of Principal Wayne Newton). On Tuesdays and Thursdays, classroom instruction does not begin until 8:31 AM. J.A. 245-46, 368.

During the activity period, students may choose to participate in any one of more than 25 activities, ranging from academic interests to recreational and social pursuits.[2] Students also have the option of remaining in their homerooms, studying in the library, or visiting the computer station to receive career guidance and college preparation. App. A at 7-8a. Attendance at any of the activities is left to the individual student and is completely voluntary. App. A at 8a, 18-20a. The activity period is not tied to the formal curriculum of the school. App. A at 19a.

In September, 1981, three students, Lisa Bender, Morris Braggs, and Kerry Hunter, all seniors, asked Mr. Wayne Newton, the school principal, for permission for themselves and other interested students to meet during the activity period for Scripture reading, discussion, and prayer. Mr. Newton initially granted their request, but advised them that they could not use the public address system or bulletin boards to publicize the meeting. App. A at 6a.

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[2] Student clubs which are currently active include: Student Government; Peer Helpers; Key Club; Class organizations; Business English Club; Future Homemakers of America; Vocational-technical Club; Spanish Club; Ecology Club; Speech and Drama Club; Office Aides; Band; Choir; Student Newspaper; Student Literary Art Magazine; and a Student Yearbook.

Other clubs which have been approved in the past and might be renewed if interest warranted are: Archery; Art, Audubon; Aviation; Bowling; Chemistry; Chess; Field, Forest and Stream; Future Nurses; Future Teachers; German; Poetry; Photography; and Ski Club. App. A at 8a n.8.

BEST AVAILABLE COPY

Forty-five students, or less than 2 percent of the student body, attended the first meeting of this group, later to be called "Petros". *Id.* A teacher opened the room, took attendance, and remained in the room grading papers, but took no part in the meeting. App. A at 9-10a. The students read a few Bible verses without comment, and some students shared concerns for which they wanted prayer, and a few students prayed. J.A. 402. The school did not receive any complaints from anyone about the meeting. J.A. 256.

At the second meeting of the group, Morris Braggs told the 20 students in attendance that Mr. Newton had decided Petros could not meet until he had obtained approval from the superintendent of schools and the school's attorney. Mr. Newton expressed concern to the students over the constitutionality of the meeting. J.A. 254. After a short prayer, the students immediately disbanded and returned to their homerooms. J.A. 402.

On October 1, 1981, the students wrote a letter to the school district superintendent expressing their disappointment at being barred from meeting. J.A. 228, 230. In response, the superintendent told them it would be "legally improper for a School District to approve or endorse such an activity on school district premises or on school time." J.A. 84 (letter of Superintendent Oscar Knade to Morris Braggs). He told them that they could not meet until the school's attorney had issued a written opinion on the matter. He asked the students to provide him with information about the proposed activity including information about faculty role, meeting times, and likely membership. *Id.* The students provided the superintendent with the requested information on October 23, 1981.[3]

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[3] The student proposal submitted at the superintendent's request reads as follows:

The following week, the school's attorney issued a written opinion which concluded that for the school to permit Petros to meet would violate the First Amendment. J.A. 80. On November 16, 1981, the school principal and the superintendent met with six Petros student representatives to explain the constitutional reasons for banning their meeting. J.A. 80-81. The students were not per-

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NAME OF THE ORGANIZATION

[Petros] (The Rock)

THE NATURE OF THE ORGANIZATION

The organization will be a non-denominational prayer fellowship. Participation will be voluntary and open to all students.

PURPOSE OF THE ORGANIZATION

The purpose of the organization will be to promote spiritual growth and positive attitudes in the lives of its members.

LEADERSHIP

Selection of leaders will be by democratic election. The leaders will be responsible for directing the meetings and coordinating activities in a manner that will carry out the purpose of the organization.

MEETINGS

Regular meetings of the organization will be held on school premises during the Tuesday and Thursday morning activity periods. They will include Scripture reading, discussion, prayer and other activities which may be of interest to the group.

SUPERVISION

Meetings of the organization will be supervised by a faculty advisor. Student attendance may be verified by the signing of a roster.

App. A at 5-6a. There is no formal mechanism or procedure for applying to be allowed to meet during the activity period, other than oral and possibly written request as was done by the students. *Id.* at 8a n.8.

mitted to meet before or after school on campus. J.A. 254, 288.[4]

The students appealed to the school board. J.A. 234. On January 19, 1982, the school board approved the ban, again on advice of counsel. J.A. 89. Two days later, the president of the board sent the students a letter denying their appeal, stating as the basis for the denial:

> The solicitor [has] advised the Board that to approve your proposal would be a violation of existing case law and therefore, an improper action. The Board decided, therefore, to deny your appeal.
>
> Please be assured that neither the School Board, nor the Administration regard the proposed prayer fellowship group as being unworthy. Present law simply does not permit public schools to authorize or support religious activities on school property.

App. A at 6a.

According to Mr. Wayne Newton, the school principal since 1974, no group of students had ever been denied permission to meet during the activity period, except the students before this Court. App. A at 8a. The decision banning the petitioners' meetings was made *solely* on the advice of the school district attorney that such a meeting would violate the Establishment Clause of the United States Constitution. App. A at 21a. J.A. 89.

There is no evidence that the school district has ever initiated or promoted a religious activity in the past. J.A. 258. In the past, the school has offered elective courses in "Literature of Western Religions", although it was not offered in 1981-82. J.A. 271.

On June 3, 1982, ten student members of Petros and their parents brought suit against the school district,

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[4] An off-campus "released time" option was discussed. This was an empty offer, however, in view of the 30-minute time allowed for the activity period and the school's isolated location (over one mile from the nearest residence), coupled with the fact that the vast majority of the students are bussed and, therefore, have no independent transportation. J.A. 246, 248, 249.

its administrators and the school board members in the United States District Court for the Middle District of Pennsylvania. The complaint alleged that denying them permission to meet violated their freedom of speech, free exercise of religion, freedom of association, and equal protection rights. Defendants' answer substantially admitted the facts in the complaint and relied on the Establishment Clause as their defense to the students' claims.

B. The Decision of the District Court

After discovery, the parties filed cross motions for summary judgment. Chief District Judge William Nealon granted summary judgment to the students on their free speech claim and granted summary judgment to the school board on the free exercise of religion claim. In holding for the students, the Court relied on *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and held that the school had denied the students the right to meet during the activity period, a limited open forum for students' speech, solely because their speech was religious. App. C at 102a.

The district court held that "*under the precise set of undisputed facts presented*", accommodating the students' speech would not violate the Establishment Clause. *Id.* (emphasis in original). Therefore, the school district had not demonstrated a compelling state interest to justify abridgement of the students' freedom of speech.

The district court held that the limited open forum had a self-evident secular purpose. *Id.* at 88a. Second, the primary effect of equal access would be the accommodation, not the advancement, of religion, given the "broad spectrum of student groups" meeting, as in *Widmar*. *Id.* at 90a. The district court found that high school students are mature enough to appreciate the neutrality of equal access, particularly absent the coercion which had existed in the "traditional school prayer cases." *Id.* at 97a. Third, no excessive entanglement was found "[i]nasmuch as the teacher would be present only to ensure orderly meetings" and "would be the functional equivalent of a policeman at a religious rally held in a public park." *Id.* at 99-100a.

Following the district court decision, the students met during the activity period for the 1983-84 school year. In letters exchanged between the attorneys for the students and the school district, the meetings were described as being student-initiated, student-led and orderly. App. D at 107a.[5] Members of the group discussed peer problems, school problems and home problems; some read Scripture and prayed. *Id.* A teacher sat at a table in a different part of the room from the students, graded papers and prepared lesson plans. *Id.* The meetings were held in a section of the cafeteria away from all other classrooms and students. *Id.* No students at the school believed that the meetings were "school-sponsored", and there was no divisiveness stemming from the meetings. *Id.*[6]

C. The Decision of the Court of Appeals

Defendant John Youngman appealed the district court's ruling on the students' free speech rights to the U.S. Court of Appeals for the Third Circuit.[7] On July 24,

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[5] The subsequent conduct of the meetings in 1983-84 is not part of the record in the proceedings below. However, the continued accuracy of the factual findings of the district court regarding the nature of the meetings in 1981 were not disputed by the court of appeals and can be accepted by this Court.

[6] *See also*, Taylor, *Student Prayer Group Sues for Right to Meet*, The New York Times, August 7, 1984, at 8 ("But at the Williamsport high school, by all accounts there has been no hint of pressure for students to join Petros, which has both supporters and opponents in the Williamsport community, and nothing resembling official endorsement of religious activity.").

[7] The school board members were sued both in their official and individual capacities. After the parties filed their briefs on the merits in the court of appeals, Mr. Youngman's tenure on the school board ended. A petition for attorneys' fees under 42 U.S.C. 1988 is pending before the district court against Mr. Youngman and the other defendants. *Cf., e.g., Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 347 n.6 (1979).

Furthermore, Williamsport Area School District has continuously treated Mr. Youngman's appeal as its own. On October 10, 1984,

1984, a divided panel of the Third Circuit reversed the district court holding on the basis of the Establishment Clause. It agreed with the district court's holding that, under *Widmar*, the defendants had violated the students' free speech right by excluding them from a limited public forum solely on the basis of the religious content of their speech. App. A at 20-21a.

However, the panel majority held that the Establishment Clause would be violated by allowing the students to meet. Although it agreed that the secular purpose of the forum was "manifest", *id.* at 2-3, it held that accommodating the students' religious speech would have the primary effect of advancing religion and result in excessive entanglement. *Id.* at 32a, 35a.

The Third Circuit rejected the Establishment Clause analysis in *Widmar* as inapplicable to high school students. Having held that both the Free Speech Clause and Establishment Clause were violated, the panel believed it faced "a constitutional conflict of the highest order . . . . with no definitive guidance from the Court as to the proper direction to take." *Id.* at 36a. It held that the Establishment Clause outweighed the students' free speech rights. *Id.* at 41a.

Judge Adams dissented, on the grounds that the majority opinion is inconsistent with *Widmar* v. *Vincent.*

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the school district denied the students permission to meet for religious speech because of the Third Circuit decision. *See* App. D. In addition, on September 1, 1983, the school district entered a brief in opposition to the students' petition for attorneys' fees in excess of $20,000, under 42 U.S.C. 1988, on the grounds that the district court decision was on appeal to the Third Circuit and, if the decision were reversed, the students would not be the prevailing party. On December 14, 1983, the district court ordered the fee petition held in abeyance pending the outcome of the appeal. On August 29, 1984, the school district moved for dismissal of the students' petition for attorneys' fees before the district court, on the grounds that students were no longer the prevailing party in the district court after the court of appeals decision.

Specifically, Judge Adams wrote that the majority's "bright line rule—no prayer in public secondary schools" is a "wooden reading of the First Amendment" and "at variance with controlling precedent." *Id.* at 45-46a. Having refuted the majority's distinctions between *Widmar* and Williamsport, Judge Adams suggested that the majority's concern "stems not from the prospect of establishment of religion by the presence on the campus of Petros, but from the possibility of unconstitutional extensions of the Williamsport arrangement elsewhere", which "can be dealt with as they arise." *Id.* at 61a.

On August 15, 1984, with two judges dissenting, the Third Circuit denied the students' petition for rehearing and request for rehearing en banc. On August 28, 1944, the Third Circuit issued a stay of mandate until November 13, 1984, pending the filing of the petition for a writ of certiorari.

On September 20, 1984, the school turned down the students' request for permission to meet during the activity period for the 1984-85 school year on the same basis as the students had met the year before. On October 10, 1984, the school board again denied the students' request to meet. App. D.

On July 25, 1984, the United States House of Representatives passed the Equal Access Act by a vote of 337-77, which had passed the Senate on June 27, 1984, by a vote of 88-11. Title VIII of Public Law 98-377. On August 11, 1984, President Reagan signed the Act into law, thereby prohibiting a public secondary school which has a limited open forum from denying equal access to students who wish to meet for "religious, political, philosophical, or other speech".[8]

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[8] An ad hoc committee has formulated guidelines to school administrators for administration of the Act. 130 *Cong. Rec.* H12270 (daily ed. October 11, 1984) (statements of Rep. Bonker and Rep. Goodling). The ad hoc committee consists of the following groups: Christian Legal Society, American Civil Liberties Union, National

REASONS FOR GRANTING THE WRIT

Williamsport Area School District believes the Constitution prohibits any accommodation of student-initiated and student-led religious speech on campus. Therefore, it has singled out the students before this Court for unique exclusion from an expressive forum created by the school, solely because their speech is religious.

The analysis of this Court in *Widmar* prohibits such a prior restraint on extracurricular religious speech by high school students. Nor have the Establishment Clause decisions of this Court required the prohibition of *self*-initiated, rather than *state*-initiated, religious activity. The Establishment Clause is a restraint on religious speech by the state and its agents, not on religious speech by private individuals with their peers.

By holding unconstitutional the accommodation of high school students' religious speech on an equal access basis, the Third Circuit has propounded a peculiar constitutional paradox. According to the Third Circuit, the Constitution *requires* public high schools to discriminate against religious speech, even though it *forbids* public universities from doing so. This result is inherently implausible.

School administrators across the country share the confusion of the Williamsport school officials as to the constitutionality of equal access for high school students. The federal courts and school administrators need the guidance of this Court to resolve the confusion created by the conflict: 1) between *Widmar* and lower court decisions, such as this one, prohibiting equal access; 2) between lower court decisions prohibiting equal access and those indicating that some form of equal access is permissible; and 3) between the lower court decisions prohibiting equal access and the Equal Access Act, in which

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Association of Evangelicals, Baptist Joint Committee on Public Affairs, Americans for Democratic Action, National Education Association, American Association of School Administrators.

Congress recognized the application of *Widmar* to public secondary schools.

I. The decision of the Court of Appeals, denying equal access for a small, voluntary, student-initiated and student-led group wishing to meet for religious speech in a limited open forum created by a public high school for student expression, conflicts with this Court's decision in *Widmar* v. *Vincent*.

The decision of the Third Circuit prohibiting equal access for these students cannot be satisfactorily reconciled with this Court's decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). In *Widmar*, this Court held that a public university violated the Free Speech Clause by excluding religious speech from a limited public forum it had created for student meetings. This Court rejected the argument that the Establishment Clause compelled a content-based discrimination against religious speech. Although this Court did not explicitly extend its holding to secondary school students, neither did it limit its holding to college students, noting only that "[university students] are less impressionable than younger students." 454 U.S. at 274 n.14. *See, Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 506 (1969) (secondary school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

The district court below held that *Widmar* required, on the specific facts in this case, that the students be granted equal access. App. C at 84a, 101a. Although the court of appeals relied on *Widmar* to find that the students' freedom of speech had been restricted, the appellate court rejected the Establishment Clause analysis of *Widmar*, justifying its departure from *Widmar* upon certain differences between a college and a high school. App. A at 15-16a, 25a. As Judge Adams explained in his dissent, however, the majority's distinctions are "not persuasive" and its result is "at variance with controlling precedent," *i.e.*, *Widmar*. App. A at 46-48a, 54a.

A. The students' right of equal access for religious speech in this case is identical to the free speech right protected in *Widmar*.

In their holdings that the students' free speech rights had been abridged by the denial of equal access, both the Third Circuit and the district court relied heavily on *Widmar*. App. A at 14-17; App. C at 84a, 101a.[9] The courts below agreed that, as in *Widmar*, Williamsport High School had created a limited open forum for student expression and that the students' religious speech fell within the scope of the forum as defined by the school officials. App. A at 19-21a; App. C at 81a, 84a. The courts also agreed that, as in *Widmar*, the students had been denied permission to meet solely because the content of their speech was religious, thus becoming the only group denied access to the activity period in the history of the school. App. A at 8-9a, 21a; App. C at 84a.

B. The decision below, that equal access for these students' religious speech violates the Establishment Clause, conflicts with *Widmar*.

In holding that the accommodation of the students' religious speech would have a primary effect of advancing religion and create an excessive entanglement between the state and religion, the Third Circuit rejected the Establishment Clause analysis of *Widmar*. In *Widmar*, this Court held that equal access would not have a pri-

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[9] The courts below also relied on this Court's decisions in *Tinker* and *Healy* v. *James*, 408 U.S. 196 (1972) (student group cannot be denied recognition by state university based on content of their speech). *See also*, Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983); Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 Geo. L.J. 135 (1983); Loewy, *School Prayer, Neutrality, and the Open Forum: Why We Don't Need A Constitutional Amendment*, 61 N.C.L. Rev. 141 (1982); Note, *Widmar v. Vincent and the Public Forum Doctrine: Time to Reconsider Public School Prayer*, 1984 Wis. L. Rev. 147 (1984).

mary effect of advancing religion because the forum in that case was available to a broad class of nonreligious as well as religious groups. *Widmar*, 454 U.S. at 274; *see also*, *Mueller* v. *Allen*, 103 S. Ct. 3062, 3068 (1983) (state benefit of tuition tax deductions allowed to all parents has secular primary effect). This Court also held that a neutral policy of equal access would not create an excessive entanglement. *Widmar*, 454 U.S. at 272 n.10 (exclusion of religious speech creates greater risk of excessive entanglement).

The district court, in applying *Widmar* to the specific facts of this case, held that the Establishment Clause would not be violated, since the school could not reasonably be perceived to be promoting Petros. The students were free to choose among a broad range of student activities during the activity period. Moreover, Petros was student-initiated and student-led with no school employee participating in the content of the meeting. App. C at 88-99a; *accord*, App. A at 52-53a, 55a, 61a (Adams, J., dissenting).

Although the Third Circuit panel repeatedly emphasized the complete voluntariness of the students' decisions to participate in any of a broad range of activities, and repeatedly recognized the neutrality of school officials in the students' selection of activities, *id.* at 8a, 18-20a, the panel rejected the applicability of the *Widmar* Establishment Clause analysis solely because the facts in *Widmar* involved a college rather than a high school. *Id.* at 25a.

Instead, the panel majority adopted a *per se* rule which "essentially rests on the view that collective religious speech simply may not take place within the walls of a public secondary school without violating the Constitution." *Id.* at 45a (Adams, J., dissenting); *id.* at 43a n.30. The panel majority relied on various factors by which it distinguished *Widmar* and constructed an Establishment Clause violation. However, "the predicted

effect of these institutional differences [between *Widmar* and Williamsport] represents uncorroborated speculation without any basis in the record." App. A at 56a (Adams, J., dissenting).

1. *Compulsory attendance laws.* The panel majority held, in effect, that compulsory attendance laws transform all extracurricular student meetings into coercive activities. To the contrary, as the panel majority itself repeatedly emphasized, the student religious group in this case exists only if individual students, acting completely in their own discretion, decide to form a group. App. A at 8a, 18-20a. The students' private choice to meet in a limited public forum does not create any reasonable inference of state advancement, let alone coercion. *Id.* at 55a (Adams, J., dissenting) (noting that many students are over seventeen, the compulsory age limit). *See, Mueller* v. *Allen*, 103 S. Ct. at 3069 (when a state benefit is available only as the result of decisions of individuals "no imprimatur of state approval can be deemed to have been conferred on any particular religion, or on religion generally"), *citing Widmar*, 454 U.S. at 274. The panel majority erred in failing to follow this *Widmar* principle.

2. *The nonparticipatory presence of an adult monitor.* The panel majority also held that the Williamsport students would perceive the nonparticipatory presence of an adult monitor as state approval of religion. Again, this holding is unsupported by any evidence in the record. The panel majority admitted that the monitor in this case took no part in the meeting whatsoever but merely graded papers in the back of the room. App. A at 10a. The students clearly did not perceive the monitor as giving an imprimatur of state approval to their activity. Furthermore, the students had offered to forego any monitor whatsoever. App. C at 99-100a; App. A at 55-56a (Adams, J., dissenting) ("The majority's concern . . . is similarly not justified by the record.").

3. *Location of the forum.* The panel held that the students' meeting on school premises would create the perception of school approval of the content of the students' speech, relying on *McCollum* v. *Board of Education*, 333 U.S. 203 (1948). However, the panel majority erred in its disregard for the controlling factual distinctions, which it recognized existed, between *McCollum* and the self-initiated, extracurricular religious activity in the present case. App. A at 28a. It thereby rejected the clear indication in *Widmar* that *McCollum* was not an equal access case. *Widmar*, 454 U.S. at 27 n.10 (in *McCollum*, the Court had "invalidated statutes permitting school facilities to be used for instruction by religious groups, but not by others.") (emphasis in original); App. A at 57-58a (Adams, J., dissenting).

4. *The ability of high school students to distinguish state advancement from state neutrality.* The panel majority held, as a matter of law, that high school students are too immature to understand that equal access for student-initiated religious speech reflects government neutrality toward religion. However, the panel majority's holding is inconsistent with Supreme Court and numerous lower court decisions recognizing that students are sufficiently mature to engage in a protest of war, to refuse to salute the flag based on religious objections, and to understand that the study of the Bible as history or literature in public school courses does not imply state approval of religion. *See, respectively, Tinker*, 393 U.S. 503 (1969); *West Virginia Board of Education* v. *Barnette*, 311 U.S. 624 (1943); *Abington*, 374 U.S. at 225 (1963).[10] Likewise, this Court has recognized that the

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[10] *Id.* at 51a (Adams, J., dissenting), citing numerous federal court decisions recognizing high school students' ability to hear controversial views without perceiving school endorsement. *See*, Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499, 507-509 (1983) (survey of recent studies of adolescent psychology demonstrating sophisticated cognitive capacity of adolescents by age 14-15); *see*

accommodation of released time programs for religious instruction during the school day does not signal to students state approval of religion. *Zorach* v. *Clauson*, 343 U.S. 306 (1952).

The court of appeals opinion is likely to prove to be a self-fulfilling prophecy where one is dealing with the question of perception. With respect to constitutional rights, public perception is molded by the courts. Nothing in reason says that equal access for all groups is preferential treatment of one, but judicial decisions, such as the one below, will reinforce a misperception, if it indeed exists, rather than correct it.

5. *Divisiveness.* The panel majority also held that allowing Petros to meet would create political divisiveness in Williamsport Area High School, thereby, violating the excessive entanglement prong. However, this Court recently held that no inquiry into potential divisiveness is called for in a case that does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions. *Lynch* v. *Donnelly*, 104 S. Ct. at 1364-65, *citing Mueller*, 103 S. Ct. at 3071 n.11; App. A at 60a n.11 (Adams, J., dissenting).[11]

Thus, in holding that the Establishment Clause was violated, the majority ignored: 1) the specific factual findings of the district court to the contrary; 2) the guidance of this Court in *Widmar*; 3) case law and legal literature as to the maturity of high school students; and 4) the record itself. Contrary to *Widmar*, the panel majority effectively placed the burden on the students to demonstrate that the Establishment Clause would not be

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also, e.g., Bellotti v. *Baird*, 443 U.S. 622 (1979) (minor generally is sufficiently mature to obtain abortion without parental or court consent); *cf.*, U.S. Const. Amend. XXVI (high school students who are eighteen years old have the right to vote).

[11] *The New York Times, supra* n.6 (no divisiveness found in Williamsport).

violated, rather than on the state to demonstrate that it would be violated. *See, id.* at 55a (Adams, J., dissenting).

C. The failure to follow *Widmar* needlessly created a conflict between the Free Speech Clause and the Establishment Clause.

By its failure to follow the *Widmar* Establishment Clause analysis, the panel majority created an unnecessary conflict between the Free Speech Clause and the Establishment Clause. *See, Lynch* v. *Donnelly*, 104 S. Ct. 1355, 1359 (1984) (failure to follow First Amendment's affirmative mandate of accommodation results in "callous indifference" by the state and an unnecessary war between the Establishment Clause and other First Amendment protections).[12]

Believing it faced "a constitutional conflict of the highest order" and a question of first impression, the panel majority specifically held, contrary to *Widmar*, that speculative Establishment Clause concerns outweighed the students' freedom of speech. App. A at 41-43a. To the contrary, however, the unique exclusion of a religious student group itself raises a potential Establishment Clause violation, since governmental action evincing hostility toward religion is equally prohibited. App. A at 53-54a (Adams, J., dissenting); *Lubbock Civil Liberties Union* v. *Lubbock Independent School Dist.*, 680 F.2d

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[12] After finding the Establishment Clause to be a compelling state interest, the panel majority violated traditional free speech analysis by failing to consider less restrictive alternatives to a prior restraint on the students' speech. *See, e.g., Widmar*, 454 U.S. at 270. Such alternatives suggested below by the students include: 1) a disclaimer posted on the door of the room where the students meet, to the effect that the school does not approve or disapprove of the meeting being held there (*see Widmar*, 454 U.S. at 274 n.14 (university disclaimer made reasonable inference of state support less likely)); 2) a non-teacher monitor (App. A at 56a) (Adams, J., dissenting); 3) meeting in rooms other than classrooms, as the students did in this case (*id.*); and 4) foregoing use of the school media, as the students did in this case (*id.* at 59a).

424 (5th Cir. 1982) (Reavley, J., dissenting from denial of rehearing en banc); *see*, *Lynch*, 104 S. Ct. at 1368 (O'Connor, J., concurring). *See also*, *McDaniel* v. *Paty*, 435 U.S. at 617, 640-42 (Brennan, J., concurring) ("The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.")

D. The denial of equal access for student-initiated extracurricular religious speech is not required by any of this Court's decisions construing the Establishment Clause.

As the district court found, this case is "fundamentally different from the traditional school prayer cases." App. C at 96a. Also, as Judge Adams emphasized in his dissent, a distinction of a constitutional dimension exists between a *state*-initiated religious activity in which students may choose to participate and a *self*-initiated, *self*-directed religious activity, which a school merely allows under a neutral policy of equal access for students to meet to discuss their various interests. App. A at 61a (Adams, J., dissenting).

The Third Circuit erroneously applied the Establishment Clause beyond official state action to encompass the self-initiated, self-directed activities of private individuals in an expressive forum in which the only participants are their peers. In contrast, the cases in which this Court has found an Establishment Clause violation have all involved state-initiated religious activity as part of the school's curriculum. *See*, *Jaffree* v. *Wallace*, 705 F.2d 1526 (11th Cir. 1983), *summarily aff'd in relevant part*, 52 U.S.L.W. 3719 (U.S. April 3, 1984) (state composed prayer and state led prayer unconstitutional); *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (state statute and local regulations established prayer led by student "volunteers" in classroom in daily opening exercises); *Stone* v. *Graham*, 449

U.S. 39 (1980) (state statute requiring posting of the Ten Commandments on public classroom walls); *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963) (state laws requiring daily Bible reading and recitation of the Lord's Prayer in public classrooms); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (recitation of a state-composed prayer in public classrooms required by statute); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) (school officials on their own initiative and pursuant to state statute invited only religious outsiders into the school classrooms to conduct religious classes as part of the school curriculum).

II. Confusion exists among federal courts and, therefore, among school administrators as to the constitutionality of accommodating high school students' religious speech on an equal access basis.

The courts below emphasized the uncertainty federal courts face in adjudicating the issue of accommodating high school students' religious speech. Thus, the Third Circuit, fearing an irreconcilable conflict between the Free Speech Clause and Establishment Clause, explained:

> We are thus faced with a constitutional conflict of the highest order. Moreover, in deciding *Widmar*, the Supreme Court explicitly declined to reach the questions that would arise if state accommodation of free exercise and free speech should, in a particular instance, conflict with the prohibitions of the Establishment Clause. We are therefore left with no definitive guidance from the Court as to the proper direction to take in this unique circumstance. App. A at 36a.

Similarly, the district court emphasized the need for guidance from this Court:

> The court is fully aware that the result reached in this case will not be free from doubt unless and until the Supreme Court clarifies two very important areas of the law—the extent to which there can be a 'forum' for students in their high schools and the

status of prayer in those institutions when initiated by students acting independent of outside influences. App. at 101a.

Due to this confusion in the federal courts, school administrators and state education officials [13] are increasingly confused about the constitutionality of accommodating students' extracurricular religious speech when a high school has chosen generally to permit students' extracurricular speech. As in Williamsport, high school administrators increasingly believe they have no choice but to prohibit students from meeting for religious speech.[14]

The confusion of school administrators is nationwide [15] and has three primary sources: 1) the lack of explicit direction from this Court on the application of *Widmar*

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[13] State departments of education and state attorney generals are under pressure to adopt statewide regulations regarding religious activities in the schools, including equal access. *See, e.g., ACLU, et al.*, v. *Scanlon, et al.*, No. 1181 C.D. 1981 (Pa. Commw. Ct., 1982), *aff'd*, No. 10 M.D. (Pa., April 26, 1983) (initial complaint sought court order to State Secretary of Education to adopt statewide regulations concerning religious activities in the public schools); *Student Bible Group Sparks School Flap*, The Washington Post, March 16, 1984, at 3, col. 3 (school board asks Maryland Attorney General for opinion on constitutionality of equal access).

[14] *See, e.g.*, 130 Cong. Rec. S8333-34 (daily ed. June 27, 1984) (statement of Senator Orrin Hatch) (reprinting letter dated October 28, 1982, from Los Angeles County Counsel to the Administrator of Secondary Education stating that the Establishment Clause prohibits a student group using a room at lunch to read and discuss the Bible). *Hearings on the Equal Access Act: Hearings on H.R. 2732 Before the Subcom. on Elementary, Secondary, and Vocational Education of the Comm. on Education and Labor, House of Representatives*, 98th Cong. 1st Sess. 39-40 (1983) (statement of Luke Thornton, Principal, John I. Leonard High School, Lake Worth, Fla.) (testifying that he is confused about the legality of equal access for religious student meetings).

[15] S. Rep. No. 357, 98th Cong., 2d Sess. 11-14 (1984); H. Rep. No. 710, 98th Cong., 2d Sess. 4-6 (1984).

to high school students' religious speech rights; 2) the inconsistency between *Widmar* and the decisions of lower federal courts prohibiting equal access; and 3) the apparent conflict among decisions in the lower federal courts, some holding equal access for high school students to be unconstitutional *per se* while others indicate that some degree of accommodation is permissible.

A. The lower courts and school administrators need the guidance of this Court.

In *Widmar*, this Court appeared to leave open the possibility that, because of a possible maturity difference, students below the college level might misperceive equal access as state advancement of religion. 454 U.S. at 270 n.14. The Third Circuit and many school district attorneys have interpreted this as a signal that the Constitution does not protect the religious speech of high school students. App. A at 24-25a; *see also, Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982) (citing footnote 14 of *Widmar* to support finding that primary effect prong violated by equal access below college level).

Searching for some guidance from this Court on an issue involving such important constitutional issues, school district attorneys have seized upon the denials of certiorari in several recent equal access cases as confirmation that equal access for high school students' religious speech is constitutionally prohibited.[16] *Lubbock*, 669 F.2d 1038, *reh. denied*, 680 F.2d 424 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983) (a school district policy allowing equal access "before or after regular school hours" for student meetings for "any educational, moral, religious or ethical purposes" held unconstitu-

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[16] *See, e.g.*, 130 Cong. Rec. S8333-34, *supra*, note 14 (letter from Los Angeles County Counsel to school administrator citing denial of certiorari in *Brandon* v. *Board of Education*, *infra*, and footnote 14 of *Widmar* as evidence that equal access is unconstitutional.

tional); *Brandon* v. *Board of Education of Guilderland Central Schools*, 635 F.2d 971 (2nd Cir. 1980), *cert. denied*, 454 U.S. 1154, *reh'g denied*, 455 U.S. 983 (1982) (equal access before school for voluntary student prayer group held unconstitutional); *Johnson* v. *Huntington Beach Union High School District*, 68 Cal. App. 3d 1 (Cal. Ct. App.), *cert. denied*, 437 U.S. 887 (1977) (Establishment Clause prohibits school district from allowing equal access during lunch hour for religious student group).

The importance of the issue of accommodation of students' extracurricular religious speech is underscored by this Court's recent decisions to review two cases involving religious activity on public property: *Jaffree* v. *Wallace*, *supra*, *prob. juris. noted*, 52 U.S.L.W. 3719 (U.S. April 3, 1984) (No. 83-812); and *McCreary* v. *Stone*, 739 F.2d 716 (2d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3285 (U.S. Oct. 16, 1984) (No. 84-277). In neither *Jaffree* nor *McCreary* did a conflict among the circuits exist nor had confusion reached the degree it has on the issue of equal access for students' religious speech.

Moreover, the decisions in those cases will not end the confusion on equal access. As in this case, *McCreary* involves the application of *Widmar* beyond the factual setting of a university and, therefore, raises the issue of the accommodation between the Free Speceh and Establishment Clauses. However, while this case involves the same clash as perceived by this Court in *McCreary*, here it occurs in the far more important context of the public high schools. See App. A at 23a, n.20.

Similarly, in *Jaffree*, the state raised the issue of accommodation of students' religious beliefs in the public high school context, thereby underscoring the importance of the issue in this case. However, while *Jaffree* involves the permissibility of accommodating students' religious beliefs in the public schools, a period of silence does not implicate the basic freedom of speech right claimed by

the Williamsport students and recognized by the Third Circuit. App. A at 36-38a. Furthermore, if a period of silence for prayer or meditation is held constitutional, school administrators may still believe they are compelled to prohibit equal access for *vocal* religious speech. If a period of silence for prayer or meditation as a curricular activity is held unconstitutional, the constitutionality of accommodating students' extracurricular religious speech will remain unresolved.

B. Conflicting decisions of lower federal courts exacerbate the growing confusion among school administrators.

At least two levels of conflict exist among the lower federal courts on the issue of equal access: First, whether the Free Speech Clause protects students' religious speech in a high school forum; and second, whether the accommodation of high school students' religious speech is a *per se* violation of the Establishment Clause.

In *Brandon* and *Lubbock*, the Second and Fifth Circuits held that the Free Speech Clause does not protect high school students' religious speech in a high school forum. *Brandon*, 635 F.2d at 980; *Lubbock*, 669 F.2d at 1048. However, the Third Circuit explicitly held to the contrary in this case. App. A at 36-38a.

The lower federal courts have gone their separate ways on the issue of the accommodation of students' religious speech under the Establishment Clause. In *Brandon*, the Second Circuit held such an accommodation before school to be a *per se* violation of the Establishment Clause. In *Lubbock*, the Fifth Circuit similarly held that a school district policy of accommodation is a *per se* violation, although the holding, perhaps, may be limited to school districts with a past history of impermissible religious activity.[17] In this case, the Third Circuit held

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[17] The *Lubbock* decision is confusing, not only due to its inconsistency with *Widmar*, but also due to: 1) the severe limitation it imposes on school board discretion in developing a policy for extracurricular student groups, and 2) the breadth of its definition of

that accommodation during school hours is a *per se* violation, although it implied that the door might be open for consideration of accommodation before and after school. App. A at 30a n.23, 43a n.30; *but see, id.* at 61-62a (Adams, J., dissenting) (majority adopted *per se* rule prohibiting any prayer in public secondary schools).

In contrast, the Eleventh Circuit in *Nartowicz* v. *Clayton County School District*, 736 F.2d 646 (11th Cir. 1984) (affirming district court order granting preliminary injunction prohibiting school district from allowing equal access for religious student group) indicated that equal access is permissible if "the school district merely accommodates", as opposed to endorses "the students' religious speech." *Id.* at 649. In the Tenth Circuit, a federal district court upheld a school district policy allowing equal access, if the meetings were limited to after—but not before—classes. *Bell* v. *Little Axe Independent School District No. 70*, No. CIV-81-620-T (W.D. Okla., Mar. 14, 1983), *appeal docketed* No. 83-1458, 83-1493 (10th Cir. April 5, 1983), *argued*, Sept. 10, 1984. The court ruled unconstitutional student religious meetings which had been held before classes began. *Id.* slip op. at 17. Finally, in the Sixth Circuit, a federal district court upheld the constitutionality of voluntary student meetings for prayer before classes began. *Reed* v. *Van Hoven*, 237 F. Supp. 48 (W.D. Mich 1965).[18]

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the school day to prohibit equal access from the time the first student boards a school bus in the morning to the time the last student leaves a school bus at night. *See, Lubbock*, 680 F.2d 424, (5th Cir. 1982) (denial of petition for rehearing en banc) (Reavley, J., dissenting) (dissenting judges uncertain as to scope of panel's decision).

[18] A case involving equal treatment for students' religious speech and press rights recently arose in the Eighth Circuit. *Pagitt* v. *Independent School District No. 270*, No. 3-84-712 (D. Minn. filed July 3, 1984) (two students suspended for distributing newspaper solely because its content was religious).

The state courts considering equal access have come to conflicting conclusions: *ACLU, et al.* v. *Scanlon, et al.*, No. 1181 C.D. 1981 (Pa.

C. The fallout of the confusion is costly to both students and school districts.

Although widely criticized by constitutional commentators,[19] the *Brandon* and *Lubbock* decisions have had a national impact far beyond the boundaries of the Second and Fifth Circuits. The *Bender* decision will have a similar effect, if allowed to stand. Besides causing many

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Commw. Ct., July 30, 1982), *aff'd. on procedural grounds*, No. 10 M.D. (Pa., April 26, 1983) (relying on *Widmar*, court refused to enter consent decree in which school districts agreed to prohibit equal access for religious student meetings); *Johnson* v. *Huntington Beach Union High School District*, 68 Cal. App. 3d 1, *cert. denied*, 437 U.S. 887 (1977) (school policy of equal access for religious speech held unconstitutional); *Trietley* v. *Board of Education*, 65 A.D. 201, 409 N.Y.S. 2d 912 (N.Y. App. Div. 1978) (equal access for student Bible club before or after school would violate the Establishment Clause).

The confusion surrounding the constitutionality of equal access also can be seen in cases involving the rights of nonstudent groups to meet on school premises during evenings and weekends. *See, e.g.*; *Country Hills Christian Church* v. *Unified School District No. 512*, 560 F. Supp. 1207 (D.Kan. 1983) (school district required to allow equal access to community religious group on weekends on basis of *Widmar*); *Salinas* v. *School District of Kansas City, et al.*, No. 83-0194-CV-W-8 (D. Mo. Dec. 28, 1983), *appeal docketed*, No. 84-1535-WM (8th Cir. 1984) (school district denial of equal access to community religious group upheld); *Civil Liberties Union of Mass., et al.*, v. *School Committee of Greenfield, et al.*, Civil No. 15281 (Mass. Dist. Ct. Sept. 4, 1984) (school district constitutionally prohibited from denying equal access to community religious group); *see also, Laity and Clergy Concerned* v. *Chicago Board of Education*, No. 83 C 2693 (N.D. Ill. Jan. 20, 1984) (denial of equal access to outside group with religious ties, when outside military groups allowed on campus during school hours, held unconstitutional, although religious nature of group not an issue). *See also, May* v. *Evansville-Vanderburgh School Corp.*, No. EV84-165-C (S.D. Ind., filed June 8, 1984) (devotional meeting before school solely of teachers terminated by school authorities).

[19] *See, e.g., Loewy, supra*, n.9 at 141, 147; Note, *Religious Expression in the Public Forum, supra*, n.9 at 154-55; Note, *Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, n.9 at 507-508.

school administrators to prohibit religious student meetings, the *Brandon* and *Lubbock* decisions have led many school administrators to prohibit all forms of private religious expression on school campus. For example, community service activities by students have been prohibited [20]; religious conversations have been banned between students [21]; individual acts of religious observance have been banned [22]; research papers by students on religious topics have been prohibited [23]; and student yearbooks have been censored.[24]

In addition to the damage done to students' fundamental rights of freedom of religious speech and association, these actions, born of confusion, have damaged the re-

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[20] S. Rep. No. 357 at 16 (benefit dance in school gymnasium for the American Cancer Society by youth group affiliated with the Young Women's Christian Association (YWCA) prohibited by Lubbock, Texas, school district).

[21] *Id.* at 17 (Boulder, Colorado school administrator prohibits group of two or more sitting together for a spiritual discussion).

[22] *Id.* at 18 (Minnesota fourth grader reprimanded for bowing head before a meal). See also, 130 *Cong. Record* S8335 (daily ed. June 27, 1984) (statement of Sen. Hatch) (reprinting letter of El Paso, Texas, school district threatening special education student with review of educational program for engaging in public prayer (the rosary) on school bus and public witnessing of her faith at her school).

[23] S. Rep. No. 357 at 17 (research paper on the Resurrection of Christ unacceptable although papers on breast feeding, suicide notes, and demon possession were acceptable).

[24] *See, School Cuts Bible Club From Book—Literally*, The Palm Beach Post, May 28, 1983, at 1 (using razor blades, school administrators cut pictures of students in the Bible Club from student yearbook for year of Establishment Clause violation); *but cf., Stanton* v. *Brunswick School District*, Civil 83-0464P (D. Me. January 23, 1984) (preliminary injunction ordering school district to allow student to place below her picture in student yearbook a graphic description of effects of execution on person being executed); *Students File Yearbook Censorship Suits*, The Los Angeles Journal, March 2, 1984, at 3 (Montgomery County, Maryland, high school students sue school district for barring student yearbook from publishing 10 pages of pictures showing students holding beer cans and a picture with the words "riding a train high on cocaine").

spect many students previously had for their school authorities.[25] Understandably high school students increasingly perceive the schools and the courts as hostile, not neutral, toward religious expression.[26]

The Senate Judiciary Committee found that the confusion is also financially costly to school districts.[27] School districts now face an expensive dilemma: deny students the right to meet and risk a lawsuit by them and their parents, or permit the students to meet and risk a lawsuit by those opposed to equal access. For economic reasons alone, school districts need resolution of the constitutionality of equal access.

Although Congress has said that the protection of *Widmar* should be enjoyed by high school students,[28] school administrators, as well as federal judges, will remain uncertain until this Court gives explicit guidance as to whether accommodating high school students' religious speech on an equal access basis is constitutionally permissible.

III. The Third Circuit decision frustrates the Congressional objective of the Equal Access Act.

In passing the Equal Access Act[29], members of Congress repeatedly stated their belief that the principles of

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[25] S. Rep. No. 357 at 20; *see also, id.* at 13 (Sonoma, California, school board officially prohibits religious student meetings but informally tells students it will look the other way if they meet).

[26] *Id.* at 19-20; *see also, Lubbock*, 680 F.2d at 426 (Reavley, J., dissenting) (students may be given the impression that the courts and schools are hostile to all religious belief and practice.

[27] S. Rep. No. 357 at 21.

[28] *See, e.g.*, 130 *Cong. Rec.* S8337 (daily ed. June 27, 1984) (statement of Senator Hatfield); *id.* at S8338 (statement of Senator Dixon); *id.* at S8355 (statement of Senator Levin); *id.* at S8356 (statement of Senator Bumpers); *id.* at S8357 (statement of Senator Durenberger); *id.* at S8358 (statement of Senator Biden); *id.* at S8361 (statement of Senator Dole); and *id.* at S8364 (statement of Senator Thurmond).

[29] Title VIII of Public Law 98-377. App. E at 113-14a. The Act was passed by the House of Representatives on July 25, 1984, by a

Widmar should protect the fundamental right of religious speech for secondary school students.[30] Members of Congress also expressed their opposition to the decisions in *Brandon* and *Lubbock*, which they viewed as incorrect and hostile toward religion.[31] Members further believed the district court decision below to be correct.[32] The Senate Judiciary Committee concluded that high school students are mature enough to understand that equal access is a policy of state neutrality toward religion.[33]

Congress passed the Equal Access Act in an attempt to alleviate the confusion of school administrators pending guidance from this Court.[34] However, its success in easing the confusion is presently unclear. For example, the Williamsport School District has already indicated that it believes the Act is unconstitutional due to the Third Circuit decision. App. D at 111a. This perception of a conflict between the federal courts and Congress will exacerbate the already high level of confusion among school officials, students, and their parents.[35]

The Act reflects our Nation's historic tolerance for neutral accommodation of religious beliefs, practices and

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vote of 337-77, having passed the Senate on June 27, 1984, by a vote of 88-11. The President signed the Act into law on August 11, 1984.

[30] *See* n.28, *supra*.

[31] S. Rep. No. 357 at 6-10, 35-36; H. Rep. No. 710 at 3; *see also, e.g.*, 130 *Cong. Rec.* S8337 (daily ed. June 27, 1984) (statement of Senator Hatfield); *id.* at S8358 (statement of Senator Biden); *id.* at S8359 (statement of Senator Nickles); *id.* at S8361 (statement of Senator Dole).

[32] S. Rep. 357 at 32; *see also, e.g.*, 130 *Cong. Rec.* H7726-27 (daily ed. July 25, 1984) (statement of Rep. Roukema).

[33] S. Rep. No. 357 at 10, 35; *see also*, H. Rep. No. 710 at 4.

[34] S. Rep. No. 357 at 11-14; H. Rep. No. 710 at 4-5.

[35] *See, e.g.*, Hertling, *Education, Legal Groups Draft Guidelines for Equal Access Act*, Education Week, Oct. 3, 1984, at 11 ("The equal-access law passed by the Congress runs counter to decisions in four federal appeals courts, which affect 12 states").

interests. The majority opinion below conveys the opposite message. It teaches high school students that speech is "free" only so long as it is purged of religious content and that government "neutrality" requires invidious discrimination against their own voluntary, self-initiated religious activity. Such "[m]isconceptions over the appropriate roles of church and state learned during one's school years may never be corrected." *Brandon*, 635 F.2d at 978.

CONCLUSION

Equal access represents a sound accommodation of religious speech among students within the framework of the First Amendment. As Judge Adams concluded, "[w]hen the schools can teach such tolerance to our young citizens without impermissibly sponsoring religion, the Constitution and the Nation are better for it." App. A at 62a.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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